IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1263

LOU V. BREWER, Warden of the Iowa State Penitentiary at Fort Madison, Iowa,

Petitioner,

v.

ROBERT ANTHONY WILLIAMS, a/k/a ANTHONY ERTHEL WILLIAMS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The Brief for Petitioner (p. 1) cites the District Court opinion incorrectly. The correct citation is 375 F.Supp. 170 (S.D. Ia. 1974).

QUESTIONS PRESENTED

1. Can an accused waive his Sixth and Fourteenth Amendment right to the assistance of counsel when he is interrogated by police officers in an automobile in the absence of and without notice to his retained counsel, in the face of instructions that the accused should not be questioned until he reaches counsel, after the denial of a request by counsel to be with the accused, after statements by the accused that he will provide information after seeing his attorney, and in violation of an agreement with counsel that the accused would not be questioned in the absence of counsel?

2. Did the District Court and Court of Appeals ignore evidence demonstrating a waiver by Respondent of his Fifth and Sixth Amendment rights?

3. Should this Court overrule *Miranda v. Arizona*, 384 U.S. 436 (1966), in this case?

4. Did the District Court and the Court of Appeals (a) violate the presumption of correctness given to state court findings of fact by 28 U.S.C. §2254(d), and (b) abuse their discretion by not holding an evidentiary hearing when the parties stipulated to submit the case on the state court record?

5. Should the above issues be reached when an independent ground which was fully litigated and adjudicated below, but which Petitioner has failed to raise in his petition to this Court, disposes of this case?

SUMMARY OF ARGUMENT

A. The judgments of the lower courts in this action included a decision on the merits that Respondent made the statements at issue herein involuntarily. Petitioner has not raised this voluntariness issue in his petition for certiorari. Ordinarily, this Court does not reach for issues that the parties have not presented by way of a petition or cross-petition, and this case does not fall within any exception to that general rule. The voluntariness issue disposes of this case in Respondent's favor independently of the issues that have been raised by Petitioner, and those issues therefore need not be reached by this Court.

B. The police officers involved in this case interrogated Respondent during an automobile trip with the specific purpose of obtaining as much incriminating information as possible from him before he could consult with his previously retained attorney—despite several statements by Respondent, by counsel, and by another police officer that Respondent did not wish to provide any information about the crime until he saw his attorney, and despite an agreement with counsel that the police would not question Respondent during the automobile trip. This conduct was designed to and did deprive Respondent of the assistance of his counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

C. Given the circumstances set out above, there is no question of "waiver" involved. And in any event, Petitioner has produced no evidence to meet his heavy burden of overcoming the presumption against a knowing, intelligent, and intentional waiver of Respondent's right to counsel, or to outweigh the strong evidence in this case *against* waiver.

D. In addition, the conduct of the detectives in this case violated *Miranda v. Arizona*, 384 U.S. 436 (1966), in at least two ways. First, the detectives ignored numerous indications that Respondent wished to have his attorney present when he made any statements and

purposefully continued interrogation in counsel's absence. Second, in continuing this interrogation the detectives failed to honor (scrupulously or otherwise) several indications that Respondent wished to remain silent during the automobile trip. The detectives also failed to repeat *Miranda* warnings when they asked Respondent questions about the location of the victim's shoes. All of these violations were willful attempts to circumvent Respondent's Fifth and Sixth Amendment rights.

E. Because the constitutional violations in this case do not depend on the *Miranda* guidelines, this is not an appropriate case in which to consider overruling or modifying *Miranda*. Moreover, neither the facts of the case nor the history of enforcement of *Miranda* justifies a departure from the constitutional standards enunciated in that decision or from the principle of *stare decisis*.

F. The District Court and Court of Appeals scrupulously observed the presumption of correctness given to state court findings of fact by 28 U.S.C. §2254(d). While the federal courts below properly made independent determinations of the constitutional issues presented, neither made findings of fact that conflict with the findings of the state trial court. Moreover, neither the District Court nor the Court of Appeals abused its discretion in deciding this case on the basis of the state court record, especially in light of the agreement of the parties that the District Court should do so and the failure of Petitioner to raise this issue in the Court of Appeals.

STATEMENT OF THE CASE

Although Petitioner's Statement of the Case is for the most part accurate, it does omit some facts that are

of importance to this case, and includes many others that are irrelevant. The following summary will attempt only to give an outline of the relevant facts in order to provide some overall context for the following discussion of the legal issues; more detailed analysis of the record will be given when relevant to particular points.

On December 24, 1968, ten year old Pamela Powers disappeared while with her family at the Des Moines, Iowa, YMCA; a search was quickly instituted for her. Subsequently, suspicion focused on Respondent, and the Des Moines police began to look for him in connection with the girl's disappearance. (Supp. App. to Pet.,[1] p. A2; App.[2] 37, 74). A warrant for Respondent's arrest on a charge of "child-stealing" was filed in Polk County. (App. 42).

On December 26, 1968, Respondent telephoned a Des Moines attorney, Mr. Henry T. McKnight, from Rock Island, Illinois. On Mr. McKnight's advice, Respondent then surrendered himself to the Davenport, Iowa, police. (App. 42, 46, 70). Lieutenant Ackerman of the Davenport police department gave Respondent *Miranda* warnings but did not question him after Respondent indicated that he did not wish to make any statement in the absence of Mr. McKnight. (App. 42-43, 45).

Meanwhile, Mr. McKnight went to the Des Moines police department to discuss Respondent's surrender. Mr. McKnight spoke to Chief Wendell Nichols and Detective Cleatus Leaming. While Mr. McKnight was at the police station, Respondent telephoned him from the Davenport police station. (App. 37, 38, 54). In the

[1] "Supp. App. to Pet." refers to the "Supplemental Appendix" to the petition for a writ of certiorari.

[2] "App." refers to the Single Appendix.

presence of Chief Nichols and Detective Leaming, Mr. McKnight told Respondent that he would not be mistreated or grilled, and that he should not make any statements until he reached Des Moines. (App. 38, 70). Detective Leaming testified at trial that he heard Mr. McKnight tell Respondent, *inter alia*, that he would have to disclose where the victim's body was, and that this would be done when Respondent returned to Des Moines by Respondent's telling Mr. McKnight and Mr. McKnight's relaying the information to the police. (App. 96). It was arranged that Detective Leaming would drive to Davenport to pick up Respondent and return him directly to Des Moines. (App. 38, 39, 90). At this time, there was an agreement between Mr. McKnight and the Des Moines police that Respondent would not be questioned during the automobile trip from Davenport to Des Moines. (App. 1, 2).

Following his telephone call to Mr. McKnight, Respondent was arraigned in Davenport on the Polk County child-stealing warrant; the arraigning judge advised Respondent of his constitutional rights. (App. 43, 106). Respondent then consulted with Mr. Thomas Kelly, Jr., a local attorney,[3] who subsequently informed the Davenport police that Respondent wished to remain silent. (App. 43-44, 73).

At about 9:30 A.M. on December 26, Detective Leaming and Detective Arthur Nelson of the Des Moines police department left Des Moines by automobile; they arrived in Davenport shortly before noon. (App. 44, 55). At about 1:00 P.M., Detective Leaming and Detective Nelson were introduced to Respondent

[3] Respondent testified that he consulted with Mr. Kelly "because he was the only Negro present." (App. 47).

and to Mr. Kelly. (App. 74-75). Detective Leaming gave Respondent *Miranda* warnings; he then told Respondent that they would be "visiting" during the ride back to Des Moines. (App. 55, 75). Following the warnings, Respondent asked to confer with Mr. Kelly again. (App. 75). After this conference with Respondent, Mr. Kelly, whom Detective Leaming understood to be acting as Respondent's counsel, informed Detective Leaming that Respondent should not be questioned until he saw Mr. McKnight (App. 107); Mr. Kelly also stated that he would ride to Des Moines with Respondent "to make sure his rights are protected," but Detective Leaming refused this request. (App. 107-108).[4]

With his hands cuffed behind his back, Respondent was placed in a police car with Detective Nelson and Detective Leaming. (App. 77, 83). During the return trip to Des Moines, Detective Leaming and Respondent did "visit". At the outset, Detective Leaming and Respondent discussed religion, Respondent's reputation, whether the police had searched for fingerprints in Respondent's room, police procedures, organizing youth groups, singing, and a number of other topics. (App. 79-81). During their conversation, Respondent told Detective Leaming that he would tell "the whole story" after Respondent saw his attorney, Mr. McKnight, in Des Moines. This statement was repeated on several occasions during the trip. (App. 58, 65). In the face of these statements, Detective Leaming admitted that he

[4] Detective Leaming denied these statements, but the District Court found that they were made, Supp. App. to Pet., p. A10, 375 F.Supp. at 176, and the Court of Appeals approved this finding, App. to Pet., pp. A7-A8, 509 F. 2d at 231. The record on this question is discussed in Part V, *infra*.

tried to get as much incriminating information as he could from Respondent before they "got back to McKnight." (App. 60, 61, 95). In particular, Detective Leaming, who knew that Respondent was a religious person (App. 63, 80, 81) and an escapee from a mental institution (App. 92, 95), turned the conversation from the topics mentioned above to a direct attempt to obtain information about the crime with which Respondent had been charged:

> Eventually, as we were traveling along there, I said to Mr. Williams that, 'I want to give you something to think about while we're traveling down the road.' I said, 'Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we should stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas Eve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.'

(App. 81; see also App. 63). Respondent then asked why Detective Leaming felt that they were going by the body, and Detective Leaming stated that he knew the body was somewhere in the area of Mitchellville, a town near Interstate 80 and about 15 miles from Des Moines. Detective Leaming then stated: "I do not want you to answer me. I don't want to discuss it any

further. Just think about it as we're riding down the road." (App. 81).

Some time later, "quite a ways" east of the Grinnell exit on Interstate 80, Respondent asked whether the police had found the victim's shoes. (App. 99, 100). After some further conversation about the shoes, Detectives Leaming and Nelson asked Respondent if he had placed the boots with the other articles of clothing; Respondent replied that he had not, and that the shoes were behind a gas station at the Grinnell exit. (App. 81-82, 99-100). Detective Leaming then asked what kind of shoes they were, and Respondent replied that they were brown leather boots. (App. 82). Subsequently, as the car approached the Grinnell exit, Detective Nelson asked Respondent which of the gas stations at that exit was the one in question, and Respondent directed him to a Skelly station. (App. 100).

At the gas station in Grinnell, Detective Nelson asked Respondent where the shoes would be; Respondent answered that they would be behind the restaurant part of the gas station in an old box. (App. 72, 100). However, the shoes were not found. (App. 82-83, 100).

After the detectives and Respondent left the gas station, Respondent asked whether the blanket had been found, and Detective Leaming asked whether it was with "the other stuff." (App. 62, 83-84). After further conversation about this, the three men stopped at a rest stop. Upon discovering that the blanket had already been found there, they returned to the freeway. (App. 83-84). At some point east of the Mitchellville exit, after further conversation between Detective Leaming and Respondent about "people and religion and intelligence and friends of his, and what people's opinion was of him and so forth," Respondent asked Detective Leaming how he knew the body was near

Mitchellville. Detective Leaming responded that that was his job; Respondent then stated that he would show the officers where the body was. (App. 63). Subsequently, Respondent directed detectives Leaming and Nelson to the victim's body (App. 57, 101-103).

During the automobile trip, Respondent was not warned of his constitutional rights (App. 92), and no attempt was made to inform Respondent's counsel that the officers were attempting to obtain information from Respondent or that Respondent was providing such information (App. 93). However, a highway patrol car following the detectives' car was equipped with a state-wide radio that was used to inform Captain Nichols of the Des Moines police department of the progress of the automobile trip. (App. 39, 66). After his return to Des Moines and a conference with Mr. McKnight, Respondent provided no further information about the crime. (App. 95).

ARGUMENT

I.

THE UNCHALLENGED DECISION OF THE LOWER COURTS THAT RESPONDENT'S STATEMENTS WERE INVOLUNTARY DISPOSES OF THIS CASE, AND THE QUESTIONS PRESENTED BY PETITIONER THEREFORE SHOULD NOT BE REACHED.

In addition to holding that Respondent's Fifth, Sixth, and Fourteenth Amendment rights were violated under *Massiah v. U.S.*, 377 U.S. 201 (1963), *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966), the District Court held that

Respondent's statements during the automobile trip to Des Moines were involuntary. Supp. App. to Pet., pp. A25-A29, 375 F.Supp. 170, 183-85 (S.D. Ia. 1974). Petitioner raised this issue in the Eighth Circuit Court of Appeals, but that court affirmed the District Court decision. App. A to Pet., p. A15, 509 F.2d 227, 234 (8th Cir. 1975). Petitioner's petition for certiorari in this Court, however, did not raise the voluntariness issue that was litigated and decided against Petitioner below; and this issue also was not included in the Statement of Issues in the Brief for Petitioner.[5]

In this case, the decision in Respondent's favor on the voluntariness issue disposes of the entire case and requires reversal of Respondent's conviction, regardless of what resolution may be made of the issues raised in the petition for certiorari. Thus, even if this Court were to reach and decide adversely to Respondent all of the issues raised in the petition, the decisions of the lower courts would not be overturned.

This Court has repeatedly held that its review of a case ordinarily is limited to the questions presented in the petition for certiorari. *See, e.g., Strunk v. U.S.*, 412 U.S. 434, 437 (1973); *U.S. v. O'Brien*, 391 U.S. 367,

[5] As Judge Webster recognized in his dissent in the Court of Appeals, the issues of waiver and voluntariness, though factually related, are clearly distinct. App. A. to Pet., p. A19, 509 F.2d at 236. As litigated below and presented in this Court by Petitioner, the issue of waiver involves whether Respondent knowingly, intelligently, and intentionally relinquished his right to counsel and his right to remain silent before making the statements that are at issue in this case. On the other hand, the voluntariness question centers on whether these statements were the product of Respondent's own free will or the product of outside influences (in this instance, primarily Detective Leaming's conduct). *See, Schneckloth v. Bustamante*, 412 U.S. 218 (1973); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

386, n.1 (1968); *Mazer v. Stein*, 347 U.S. 201, 208 (1954); *Irvine v. California*, 347 U.S. 128, 129 (1954); *see also, McCullough v. Kammerer Corp.*, 323 U.S. 327, 328 (1945); Rule 23(1)(c), Rules of the United States Supreme Court. "We do not reach for constitutional questions not raised by the parties." *Mazer v. Stein, supra*, at 206, n.5. This rule may not be followed in some very exceptional circumstances, such as when there is "plain error" below that disposes of the case. *See, Stevens v. Marks*, 383 U.S. 234, 246-47 (1966); *Kessler v. Strecker*, 307 U.S. 22, 34 (1939). In this case, however, there is no such exceptional reason for this Court to search beyond the questions presented by the State for additional constitutional issues that have been fairly litigated and consistently decided below. The District Court's decision that Respondent's statements were involuntary is amply supported by the record; the basis for that decision is well articulated in that court's opinion. Supp. App. to Pet., pp. A25-A29, 375 F.Supp. at 183-85. As the District Court held, there were "many factors pointing strongly to involuntariness, and the State simply failed to meet its burden of showing voluntariness." Supp. App. to Pet., p. A29, 375 F.Supp. at 185.

Given this posture of the case, this Court can and should affirm on the basis of the unchallenged lower court decisions that Respondent's statements were involuntary, without reaching the issues raised in the petition.

II.

RESPONDENT'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF HIS COUNSEL WAS VIOLATED IN THIS CASE.

A. Detective Leaming's Conduct Deprived Respondent of the Effective Assistance of his Retained Counsel.

Both the District Court and the Court of Appeals in this case held that Detective Leaming's conduct during the automobile trip from Davenport to Des Moines violated Respondent's Sixth and Fourteenth Amendment right to the effective assistance of counsel. These holdings were made independently of the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966). Supp. App. to Pet., pp. A11-A16, 375 F.Supp. at 179-81; App. to Pet., pp. A14-A15, 509 F.2d at 234.

No constitutional right of a person accused of crime is more fundamental than the right to have the assistance of counsel in meeting the efforts of police and prosecutor to obtain a conviction.[6] *See, Powell v. Ala-*

[6] Petitioner does not question that the automobile trip from Davenport to Des Moines was a "critical stage" during which Respondent had a right to the assistance of counsel. A warrant had been filed for Respondent's arrest; he had been arrested and booked; he had been formally arraigned before a magistrate on the warrant; he was in custody; prosecutorial efforts had focused on him; the police knew that he had actually retained counsel; and Detective Leaming admittedly engaged in an effort to obtain information from him that could have been—and was—used against him at trial. Clearly, the "adverse positions of government and defendant [had] solidified," *Kirby v. Illinois*, 406 U.S. 682, 689 (1972); and the automobile trip was the kind of critical state in which "potential substantial prejudice to defendant's rights inheres in the particular confrontation," *Coleman v. Alabama*, 399 U.S. 1, 7 (1970), and in which the assistance of counsel is needed to protect the defendant's interests vis-a-vis the trial itself. *See also, Massiah v. United States*, 377 U.S. 201 (1964).

bama, 287 U.S. 45, 68-69 (1932). As both of the lower court opinions indicate, the facts demonstrating a violation of the right to counsel (and of fundamental fairness) in this case are legion. Most significantly, the police not only knew that Respondent had obtained and was represented by counsel—the state trial court also found that "an agreement was made between defense counsel and the police officials to the effect that [Respondent] was not to be questioned on the return trip to Des Moines; rather, that he would talk to police officials, with his attorney, on arrival in Des Moines." (App. 1). Petitioner now seems to question this finding, despite his own references to the presumption of correctness to be given to state court factual determinations under 28 U.S.C. §2254(d). But while the agreement may not have been "contractual" in a commercial, offer-acceptance-consideration sense (see Brief for Petitioner, p. 40), the record clearly supports the state court's conclusion that when detectives Leaming and Nelson left Des Moines for Davenport, there was a mutual agreement between the police and Mr. McKnight that the police would bring Respondent straight back to Des Moines without interrogating him. (See App. 33, 35, 38, 39, 41, 64-65, 90). This is particularly apparent in light of the state court's opportunity to observe the witnesses and its explicit doubts about Detective Leaming's "complete candor" during his testimony about the agreement. (App. 2).

Even without this agreement between Mr. McKnight and the police, the facts in this case would demonstrate a violation of Respondent's right to the assistance of counsel. First, Lieutenant Ackerman of the Davenport Police Department testified that he told the Des Moines police on the morning of the day on which the automobile trip took place that Respondent did not wish to

make any statement about the crime until he saw his attorney, Mr. McKnight.[7] (App. 43, 54). Second, the Des Moines police, including Detective Leaming, knew that Mr. McKnight had told Respondent that he should not make any statement until he reached Des Moines and that he would then provide information about the location of the body *through Mr. McKnight*. (App. 38, 96).

Third, Mr. Thomas Kelly, an attorney whom Detective Leaming understood to be acting as Respondent's counsel in Davenport, informed Detective Leaming that Respondent was to provide information about the location of the victim's body only after he consulted with Mr. McKnight in Des Moines. (App. 107). And fourth, Mr. Kelly told Detective Leaming that he would "ride back to Des Moines with [Respondent] to make sure his rights are protected," but Detective Leaming refused to permit this. (App. 107-108).[8]

Fifth, Detective Leaming himself testified that on several occasions during the automobile trip, the defendant told him that he would tell "the whole story" *after* he returned to Des Moines and saw Mr. McKnight; nevertheless, Detective Leaming "kept getting what [he] could" before he and Respondent reached Mr.

[7]Moreover, Lieutenant Knox of the Des Moines Police Department stated on cross-examination that before Detective Leaming and Detective Nelson left for Davenport, Mr. McKnight told him that he wanted Respondent "brought back to Des Moines and we'll have conferences here." Abstract of Record, Supreme Court of Iowa, pp. 91-92 (relevant portions appended hereto as Addendum A).

[8]Detective Leaming denied these statements by Mr. Kelly (App. 55, 78), but the District Court and Court of Appeals correctly found that they were made. Supp. App. to Pet., p. A10, 375 F.Supp. at 176; App. to Pet., pp. A7-A8, 509 F.2d at 231. For further discussion of this conflict, see Part V, *infra*.

McKnight. (App. 58, 60, 61). Petitioner argues that these repeated statements by Respondent were "ambiguous" as assertions of a desire to have counsel before providing incriminating information, citing *Frazier v. Cupp*, 394 U.S. 731 (1969). But it is hard to see how Respondent's statements could have been interpreted as anything *but* an assertion that he wanted to have Mr. McKnight present before he gave information about the crime; moreover, quite apart from the fact that it involved a pre-*Miranda* interrogation, *Frazier* is distinguishable from the instance case on several grounds.

In *Frazier*, the defendant did not have counsel; no one had indicated to the police that the police should not question the defendant in the absence of counsel; the defendant had not been formally charged or arraigned; and the defendant's statement that "I think I'd better get a lawyer before I talk any more" was made only once, and after he had already begun to make incriminating statements. In the instant case, however, Respondent's statements were made only after, and in the context of, the other above-described indications that Respondent wished to provide information about the crime only in the presence and with the assistance of Mr. McKnight; obviously, that background removed whatever ambiguity one might have been able to read into Respondent's statements if they had been made in isolation from the other events of that day. Indeed, Detective Leaming's own testimony shows that he regarded Respondent's statements effectively as assertions of a desire to have counsel before providing information:

> Q: Did [Respondent] at any time say he wanted to have an attorney present before he talked to you?
>
> A: Not in that particular manner, no, sir.

> Q: Well, tell us in what manner, Captain.
>
> A: He told me on several times [sic], "When I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story." That would be the closest he would have come to it.

(App. 58). In any event, whether these statements were even made is not crucial in this case, given the agreement not to question Respondent and the other indications to the police that Respondent should have the assistance of his attorney before providing information about the crime.[9]

[9] Although Petitioner seems to question the timing of Respondent's statements that he would "tell the whole story" when he saw Mr. McKnight, (Brief for Petitioner, p. 44), the record in this case shows that at least some of these statements were made before Detective Leaming's efforts to gain information from Respondent through his "Christian burial" speech. Detective Leaming testified that Respondent made his statements several times (App. 58), and that the first time was "not too long after we got on the freeway, after we had gassed up and started. . . ." (App. 65). Moreover, Detective Leaming's testimony about the circumstances leading up to the "Christian burial" speech shows that there was a considerable amount of conversation that preceded that speech—conversation that must have covered a significant amount of time after they "gassed up and got on the freeway." (A. pp. 79-81). Most significantly, Detective Leaming testified that *after* Respondent had stated that he would tell the story after he got to Mr. McKnight, Detective Leaming kept talking with Respondent in an effort to get as much information as he could before they reached Des Moines. (A. pp. 60-61). Either this effort by Detective Leaming included the "Christian burial" speech, or Detective Leaming engaged in further efforts to acquire information that he did not divulge in detail during his testimony. Although the former alternative is the more likely one, for purposes of this case it does not matter which is true. Indeed, as noted in the text *supra*, given the other circumstances of this case, it really is not even crucial whether these statements by Respondent were ever made at all.

In the face of these numerous indications that Respondent should not be interrogated or provide any information about the crime until he consulted with Mr. McKnight in Des Moines, Detective Leaming embarked on a campaign to obtain as much such incriminating information as he could from Respondent *before* they reached Mr. McKnight:

> Q: [By Mr. McKnight] And you know that the defendant had said that he would tell you the story when he got back to Henry T. McKnight?
>
> A: Yes, he did, several times.
>
> Q: But you kept getting what you could before you got to Henry T. McKnight, didn't you?
>
> A: We were talking, Mr. McKnight.
>
> Q: Just answer the questions—
>
> A: But not asking questions.
>
> Q: But you kept getting what you could before you got to Henry T. McKnight?
>
> A: This is true, yes, sir.

(App. 60; see also App. 61).

In order to "get" what he could from Respondent before he could have the assistance of counsel, Detective Leaming initially participated in a conversation with Respondent about a wide range of topics, including Respondent's friends, religion, the police investigation of the defendant's room, youth groups, and playing the piano. Detective Leaming then turned the conversation to a direct appeal to Respondent's personal and religious sympathies, and made an explicit statement that Respondent should show the detectives where the victim's body was located before they reached Des Moines. (Neither Mr. McKnight nor Respondent's right to counsel was mentioned in this connection.) Following this appeal, Detective Leaming told

Respondent that he knew the body was somewhere near Mitchellville, and asked Respondent not to answer then, but to "think about it as we're riding down the road." (App. 79-81). Detective Leaming admitted in his testimony that the purpose of this approach was to get Respondent to tell him where the body was. (App. 92-93, 94, 95).[10]

Subsequently, after Respondent asked the detectives whether they had found the victim's shoes, the detectives asked Respondent if he had put them with the other articles of clothing (App. 81-82, 99-100); what kind of shoes they were (App. 82); at which gas station he had put the shoes (App. 100); and where at the gas station he had hidden the shoes. (App. 71, 100).[11] At no time during the automobile trip did the detectives warn Respondent of his right to counsel or inform Mr. McKnight of their activities, despite the availability of a state-wide radio in a highway patrol car that was following them. (App. 39, 66, 93).

In short, Detective Leaming ignored an agreement with Respondent's attorney that Respondent should not be questioned about the crime; isolated Respondent from counsel; disregarded Respondent's own statements that he did not wish to provide information about the crime until he saw his attorney; and then admittedly attempted to induce Respondent to disclose to him the location of the victim's body before Respondent could see his attorney. Even individually, any of these aspects

[10] There is some suggestion in the Brief for Petitioner and the Brief *Amicus Curiae* that Detective Leaming did not "question" or "interrogate" Respondent. This suggestion is dealt with in Part III(c), *infra*.

[11] In addition, when Respondent asked whether a blanket had been found, Detective Leaming asked whether Respondent had placed it with "the other stuff." (App. 62, 83-84).

of Detective Leaming's conduct would have been constitutionally impermissible; taken together, they constituted a massive and concerted effort to deprive Respondent of the assistance of his attorney during a period that was obviously of crucial importance to the prosecution (and defense) of the crime with which Respondent had been charged.

Had counsel been present, it is of course doubtful that Detective Leaming would even have used his psychological interrogation approach—dramatically illustrated by his "Christian burial" speech—at all. And if he had, counsel could have reminded Respondent about his right to remain silent; reduced the inherently coercive atmosphere of an interrogation in a police car; and, perhaps most importantly, advised Respondent more thoroughly and in context about the advantages, for example in terms of admissibility of evidence at trial, of providing information through counsel rather than directly to the detectives.

While the agreement not to interrogate Respondent is not really necessary to a finding of a Sixth-Fourteenth Amendment violation in this case, it is of special significance. Had this agreement *not* been made, Mr. McKnight might have insisted on riding in the police car to Davenport in order to accompany Respondent to Des Moines; this would have enabled him to counsel Respondent during any attempts by the police officers to obtain incriminating information directly from Respondent and to protect Respondent's rights in the ways suggested in the preceding paragraph. And even without being in the car, Mr. McKnight could have counseled Respondent in more detail by telephone about the possibility of interrogation and about the importance in terms of any subsequent trial proceedings that he not in any circumstances provide any information directly to the police, rather than going through Mr. McKnight.

But the agreement *was* made; and Mr. McKnight should have been able to rely on that agreement in determining what steps he should take to protect Respondent's rights prior to his return to Des Moines. The breaking of the agreement by itself misled Mr. McKnight and interfered with Respondent's right to receive the assistance of his attorney—quite apart from the other infringements on Respondent's right to the assistance of counsel that have been discussed above.

The Sixth-Fourteenth Amendment violations in this case were at least as serious as those in *Massiah v. U.S.*, 377 U.S. 201 (1964). In *Massiah*, the defendant was represented by counsel following indictment. An alleged accomplice, after deciding to cooperate with the police, agreed to have a radio transmitter in his car while he spoke to the defendant. By this device, the police were able to overhear incriminating statements made by the defendant to the accomplice. This Court held that the admission of these statements at the defendant's trial violated his Sixth Amendment right to counsel, in that the statements had been obtained through deception and in the absence of the defendant's attorney.

As both the District Court and the Court of Appeals recognized, Detective Leaming's above-described conduct before and during the automobile trip to Des Moines "deprived [Respondent] of his right to counsel in a way similar to, if not more objectionable than, that utilized against the defendant in *Massiah*. Supp. App. to Pet., p. A13, 375 F.Supp. at 177; *see also*, App. to Pet., pp. A14-A15, 509 F.2d at 234. Petitioner attempts to distinguish *Massiah* on the ground that "*Massiah* [sic] could not have waived his right to counsel because he did not know his incriminating state-

ments were being overheard by law enforcement officers. . . ." (Brief for Petitioner, p. 36). But as discussed in more detail *infra*, there could be—and was—no waiver of Fifth or Sixth Amendment rights in this case. Moreover, the distinction between this case and *Massiah* suggested by Petitioner is not a relevant one; indeed, other distinctions show that the violations in this case were *more* serious than those in *Massiah*.

At best, the fact that the defendant in *Massiah* did not know that the police were overhearing his conversation is irrelevant. Thus, in *McLeod v. Ohio*, 381 U.S. 356 (1965), this Court summarily reversed the defendant's conviction on the basis of *Massiah*, even though the statements at issue in that case were made directly to police officers (in the absence of counsel). The crucial question under *Massiah* is whether the police have elicited incriminating statements in the absence of counsel through deception or other improper conduct. *See, U.S. v. Ash*, 413 U.S. 300, 311 (1973). In *Massiah*, the deception was the placing of the transmitter in the accomplice's car. In the instant case, the police not only deceived Respondent and his attorney by making and then breaking an agreement not to interrogate the defendant, they also denied counsel permission to be present during the automobile trip and disregarded Respondent's own statements that he would provide information *when he saw Mr. McKnight*. Moreover, in *Massiah*, the conversations did not take place in the coercive atmosphere of a police station (or police car).[12]

[12] In addition, the defendant in *Massiah* normally would have had no right to the presence of counsel during conversations with friends or accomplices, and would have had to take his chances in talking to such persons that they would not relay information to the police.

A number of lower court decisions have found violations of the right to counsel in circumstances far less objectionable than the instant case. *See, U.S. v. Clark*, 499 F.2d 802 (4th Cir. 1974); *U.S. v. Durham*, 475 F.2d 208 (7th Cir. 1973); *Taylor v. Elliot*, 458 F.2d 979 (5th Cir. 1972), *cert. denied*, 409 U.S. 884, (1973); *U.S. ex rel. Magoon v. Reinke*, 416 F.2d 69 (2nd Cir. 1969), *affirming*, 304 F.Supp. 1014 (D. Conn. 1968); *U.S. v. Slaughter*, 366 F.2d 833 (4th Cir. 1966); *Lee v. U.S.*, 322 F.2d 770 (5th Cir. 1963). In *Taylor v. Elliot*, for example, police officers transporting the defendant from Georgia to Alabama (prior to *Miranda*) interrogated the defendant in the face of instructions from the defendant's attorney—relayed through the defendant's mother—that the defendant should make no statements until he arrived in Alabama. The court of appeals held that this violated the defendant's right to the assistance of counsel and reversed the defendant's conviction. Detective Leaming's conduct in this case, particularly his violation of the agreement not to interrogate the defendant, obviously was far more offensive to the Sixth Amendment than the conduct of the officers in *Taylor*. *See also, U.S. ex rel. Chabonian v. Liek*, 366 F. Supp. 72 (E.D. Wisc. 1973); *U.S. v. Wedra*, 343 F.Supp. 1183 (S.D.N.Y. 1972); *U.S. v. Springer*, 460 F.2d 1344, 1354-55 (7th Cir.) (dissenting opinion by Mr. Justice—then Circuit Judge—Stevens), *cert. denied*, 409 U.S. 873 (1972). Detective Leaming deprived Respondent of Mr. McKnight's assistance as effectively as if he had barred the stationhouse door.

B. Given the Factual Context of this Case, No Waiver of Sixth Amendment Rights Was Possible.

Petitioner does not seem directly to dispute that Detective Leaming's conduct in this case was offensive to the Sixth and Fourteenth Amendments. Rather, Petitioner argues that Respondent "waived" both his Fifth and Sixth Amendment rights before making the incriminating statements that are at issue in this action. This contention is without merit both because waiver was impossible in the context of this case and because Petitioner did not meet his burden of demonstrating a waiver.

The District Court held that "given the factual context of this case. . . . [Respondent] could not effectively waive his right to counsel for purposes of interrogation in the absence of counsel (or at least notice to his counsel . . .)." Supp. App. to Pet., p. A15, 375 F.Supp. at 178. Contrary to Petitioner's assertion, this holding did *not* create a "*per se*" rule that "once an accused has counsel, he cannot effectively waive his right to counsel for purposes of interrogation, absent presence of (or notice to) counsel. . . ." (Brief for Petitioner, p. 35). Such a *per se* rule may be appropriate; a number of lower courts have so held. *See, United States v. Durham*, 475 F.2d 208 (7th Cir. 1973); *Taylor v. Elliot*, 458 F.2d 979 (5th Cir. 1972), *cert. denied*, 409 U.S. 884 (1973); *U.S. ex rel. Magoon v. Reinke*, 416 F.2d 69 (2d Cir. 1969), *affirming*, 304 F.Supp. 1014 (D. Conn. 1968); *U.S. v. Wedra*, 343 F.Supp. 1183 (S.D.N.Y. 1972); *see also, Brooks v. Perini*, 384 F.Supp. 1011 (N.D. Ohio 1973), *aff'd*, 497 F.2d 923 (6th Cir. 1974) (table), *cert. denied*, 419 U.S. 998 (1974); *U.S. v. Springer*, 460 F.2d 1344, 1354-55 (7th Cir. 1972)

(dissenting opinion of Mr. Justice–then Circuit Judge–Stevens), *cert. denied*, 409 U.S. 873 (1972). However, the District Court's "no waiver" holding in this case was carefully limited to situations when

> the police have agreed with the defendant's attorney that the defendant will not be questioned in the attorney's absence, when another attorney has asked to be with the defendant. . . . and when the defendant has repeatedly asserted his desire not to speak in the absence of counsel. . . .

Supp. App. to Pet., pp. A15-A16, 375 F.Supp. at 186.

At least as limited by the District Court, that court's holding that no waiver was possible in this case was clearly correct, for at least three reasons. First, the circumstances enumerated above all point strongly toward *non*-waiver of Respondent's Sixth Amendment rights; when these circumstances are added to the initial presumption against waiver, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), Petitioner's already heavy burden to show waiver simply becomes impossible to meet. Second, when the defendant has counsel and the police have agreed not to interrogate the defendant in the absence of counsel, (and when the defendant's desire to have counsel present before he provides information has been communicated to the police), any subsequent interrogation without counsel is an immediate violation of the defendant's right to have the assistance of counsel during interrogation. Thus, even if an explicit "waiver" were obtained during the interrogation process, it would not be a valid one, since it would be a product of the initial violation of the defendant's rights. Finally, when the police engage in the kind of concerted misconduct that occurred in this case, and especially when their admitted aim is to deprive the defendant of the assistance of counsel during interrogation in violation of

an agreement with counsel, they act at their own risk and must not be permitted to claim "waiver" in an attempt to avoid the consequences of their actions.

None of the above implies that it is not the accused's decision whether to have the assistance of counsel, or that he can never change his mind about asserting his constitutional rights without his attorney's permission. (*Cf.*, Brief for Petitioner, pp. 40, 42). But to say that the accused does not need his attorney's *consent* in order to waive his Fifth and Sixth Amendment rights is not to say that the police may deprive the accused of his previously retained attorney's *assistance* in deciding whether to waive those rights. In this case, Respondent himself had decided that he wished to have the assistance of counsel even before he surrendered in Davenport, and his desire not to provide information about the crime without Mr. McKnight present had been communicated to the Des Moines police. Moreover, Respondent's attorney, as part of his representation of Respondent, had made an agreement with the police that there would be no questioning of Respondent in the attorney's absence. In this regard, Petitioner's emphasis that this agreement was made with counsel, and not with Respondent (Brief for Petitioner, p. 40), is misplaced and misleading: One of the essential functions of counsel is to speak *for and on behalf of his client*, and it was undeniably as counsel for Respondent that McKnight made the agreement with police. The issue is not whether the agreement bound Respondent, but whether it bound the police not to interrogate.

In this context, the initial interrogation of Respondent was immediately a violation of Respondent's right and desire to have the assistance of counsel during interrogation—including assistance in deciding whether

and to what extent to waive his Fifth and Sixth Amendment rights. The fact that a defendant, after careful inquiry to assure a knowing and intelligent waiver, may choose to proceed without counsel, *Faretta v. California*, 422 U.S. 806 (1975), does not mean that law enforcement officials may ignore or violate agreements with counsel whom the defendant has retained and whose assistance the defendant has indicated he wishes to have. "If the right to counsel is to be preserved in any meaningful sense, agreements between counsel and the police involving matters such as interrogation must be lived up to. Cf., Santobello v. New York, 404 U.S. 257 . . . (1871)." Supp. App. to Pet., P. A31, 375 F.Supp. at 186.

None of the lower court cases cited by Petitioner as having "refused to extent the [*Massiah*] decision to the point where no valid waiver can be made in counsel's absence, after counsel is retained" (Brief for Petitioner, p. 37) involved police misconduct of the kind or degree involved in this case. For example, in *United States v. Springer*, 460 F.2d 1344 (7th Cir.), *cert. denied*, 409 U.S. 873 (1972), the defendant had turned himself in after learning that there was a warrant out for his arrest on an armed robbery charge. After receiving *Miranda* warnings and signing a waiver of rights form, the defendant gave FBI agents an oral confession. Two days later, the defendant was arraigned and counsel was appointed to represent him. Subsequently, one of the FBI agents, who apparently did not know about the appointment of counsel, again warned the defendant of his rights; the defendant then signed a second waiver of rights and a typed version of the oral statement that he had previously given. A two-to-one majority of the court of appeals held that introduction of the written confession at trial did not violate the defendant's Fifth

and Sixth Amendment rights, primarily on the ground that he had waived those rights prior to signing that confession.

Unlike Detective Leaming, the FBI agent in *Springer* did not violate an agreement with the defendant's attorney; did not ignore instructions not to interrogate the defendant; did not disregard statements by the defendant that he did not wish to make any statements in the absence of his attorney; and indeed did not even know that the defendant *had* an attorney. Moreover, the FBI agent, unlike Detective Leaming, obtained an explicit waiver of the defendant's Fifth and Sixth Amendment rights. Thus, the actions of the FBI agent in *Springer* were far less offensive constitutionally than those of Detective Leaming; and at the same time, the defendant in *Springer* was more willing than Respondent to cooperate with law enforcement officials. But even in the less egregious circumstances of *Springer*, Mr. Justice (then Circuit Judge) Stevens dissented from the majority holding, arguing that the burden was on the FBI agent to find out whether counsel had been appointed and to notify counsel so that he could be present before any interrogation of the defendant took place.

> In a civil context I would consider this behavior unethical and unfair. In a criminal context I regard it as such a departure from "procedural regularity" as to violate the due process clause of the Fifth Amendment.

460 F.2d at 1355.

C. There is No Evidence of Waiver in this Case, and Petitioner therefore has Failed to Meet his Burden of Demonstrating a Waiver.

While an inquiry into "waiver" is unnecessary and inappropriate in this case, such an inquiry nevertheless would not produce a different result, since Petitioner has failed totally to meet his heavy burden of *demonstrating* waiver. "[C]ourts indulge in every reasonable presumption against waiver of fundamental constitutional rights and . . . 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.' " *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). In *Faretta v. California*, 422 U.S. 806 (1975), this Court, while holding that a criminal defendant has a right to represent himself, made it clear that the accused cannot waive his right to counsel simply by stating that he wishes to proceed *pro se*. Rather, there must be a showing that the defendant was made aware of "the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and that his choice is made with eyes open." 422 U.S. at 835. *See also, Von Moltke v. Gillies*, 332 U.S. 708 (1948).

Petitioner does not seriously dispute that he bears a heavy burden to demonstrate a waiver by Respondent of his Sixth Amendment rights prior to his statements about the location of the victim and her clothing. Instead, Petitioner contends that this heavy burden was met, basically by the giving of *Miranda* warnings before the trip to Des Moines began, and by Respondent's alleged willingness to give information to the police. (Brief for Petitioner, pp. 49-52.) As the District Court

and the Court of Appeals held, however, these contentions are without merit. Supp. App. to Pet., pp. A21-A24; 375 F.Supp. at 181-83; App. to Pet., pp. A12-A15, 509 F.2d at 233-34.

There is no dispute that *Miranda* warnings were given in Davenport, before the automobile trip to Des Moines began. But these warnings, although probably *necessary* to a finding of a knowing and intelligent waiver of Respondent's Sixth (and Fifth) Amendment rights, certainly are not *sufficient* to show an intentional and knowing relinquishment of those rights during the automobile trip. Obviously, Respondent did make statements after the warnings were given; but this is not to say that before he did so, he intentionally relinquished his right to counsel.[13]

Petitioner's "waiver" argument stresses the assertion that "soon after leaving Davenport, Williams began talking to Detective Leaming. . . ." (Brief for Petitioner, p. 50). Actually, the record is not clear on who initiated the general conversation between Respondent and Detective Leaming; and Detective Leaming conceded on cross-examination that he had earlier testified that he had "made statements to Williams first," apparently on the way to the freeway from the Davenport police station. (App. 94). But in any event, the question of who spoke the very first words after leaving the Davenport police station is not important here. Most of the conversation preceding Detective Leaming's "Christian burial" speech concerned matters unrelated to the crime with which Respondent was charged—such as religion,

[13] The instructions by counsel to Respondent not to make any statements about the crime until he returned to Des Moines (see Brief for Petitioner, p. 50), are irrelevant to waiver for similar reasons.

youth groups, playing the piano, and Respondent's minister and friends. (App. 79-81). Regardless of who initiated this conversation, it showed no willingness on Respondent's part to provide information about the crime. This is equally true of Respondent's questions about the police investigation of fingerprints and his friends' homes (App. 56, 81): Certainly the fact that an accused asks *questions* does not indicate a willingness to provide *information* about a crime in the absence of his attorney. This is especially obvious when the accused has expressed his desire *not* to provide any information until he sees his attorney.

Moreover, regardless of who initiated the conversation between Detective Leaming and Respondent, and regardless of Respondent's questions about the police investigation, it is undisputed that Detective Leaming initiated and directed a portion of the conversation by means of which he admittedly was attempting to obtain information about the crime in the absence of Respondent's counsel. In particular, Detective Leaming played on Respondent's religious and personal sympathies, and stated directly that Respondent should disclose the location of the body before they reached Des Moines. (App. 81). This was done without any previous mention of the body, without any indication on Respondent's part that he wished to provide information, in the face of statements to the contrary, and in violation of an agreement with Mr. McKnight.[14]

[14] It is significant that despite the conversation that preceded the "Christian burial" speech and Respondent's questions about the police investigation, Respondent did not provide any information about the crime until after Detective Leaming's pointed requests—vividly illustrated by Detective Leaming's own testimony about his "Christian burial" speech—that he do so. It is also significant that Respondent did not make any further statements about the crime after he saw Mr. McKnight in Des Moines. (App. 49, 95).

The "spirit of cooperation" by Respondent asserted by Petitioner (Brief for Petitioner, p. 51) is simply contrary to the record, at least in any sense that is relevant to waiver. Respondent's surrender in Davenport certainly was no indication that he wished to provide information about the crime in the absence of counsel.[15] And the testimony of Detective Leaming about the telephone conversation between Mr. McKnight and Respondent (see Brief for Petitioner, pp. 51-52) also shows no willingness by Respondent to provide information about the crime in Mr. McKnight's absence. In fact, the statements by Mr. McKnight that Detective Leaming testified he overheard imply, if anything, a reluctance on Respondent's part to disclose the location of the body under any circumstances; and the portion of that conversation that Petitioner omits from his argument made it clear that Respondent was being told to provide information *after* he returned to Des Moines, and then through Mr. McKnight.[16]

Finally, Respondent's statements about the victim's shoes, the blanket, and the body (see Brief for Petitioner, p. 51) all followed Detective Leaming's purposeful attempts to obtain information from Respondent in violation of his agreement with Respondent's attorney and in disregard of Respondent's own stated desires. As the District Court noted, it is hardly surprising that Respondent's statements were made when they were,

[15] Indeed, Respondent clearly indicated to Lieutenant Ackerman that he did not wish to provide such information until he saw Mr. McKnight in Des Moines, and he did not do so while he was in Davenport. (App. 42-43, 45).

[16] " 'When you get back here, you tell me and I'll tell them. I'm going to tell them the whole story.' " (Testimony by Detective Leaming, quoting Mr. McKnight.) (App. 96).

given that Detective Leaming asked Respondent to tell him where the body was "on the way [to Des Moines]" and then asked the defendant to "not answer" but to "think about it as we're riding down the road." Supp. App. to Pet., pp. A28-A29, 375 F.Supp. at 175.

In short, as the District Court and the Court of Appeals held, except that warnings were given and statements eventually were obtained, there is simply no evidence that Respondent waived his right to counsel either before Detective Leaming embarked on his campaign to obtain information in Mr. McKnight's absence or before Respondent made the incriminating statements that are at issue in this case. Supp. App. to Pet., p. A24, 375 F.Supp. at 182; App. to Pet., p. A12, 509 F.2d at 233. No more evidence of waiver exists here than existed in *Massiah v. U.S.* or *McLeod v. Ohio*, *supra*. Moreover, a number of lower court cases have found no waiver in situations presenting as much or more evidence of waiver than Petitioner has produced in this case. *See, U.S. v. Durham*, 475 F.2d 208 (7th Cir. 1973); *U.S. v. Blair*, 470 F.2d 331 (5th Cir. 1972), *cert. denied*, 411 U.S. 908 (1973); *U.S. v. Slaughter*, 366 F.2d 833 (4th Cir. 1966); *Lee v. U.S.*, 322 F.2d 208 (5th Cir. 1963); *U.S. ex rel. Chabonian v. Liek*, 366 F.Supp. 72 (E.D. Wisc. 1973).

Pitted against the lack of any real evidence of waiver in this case is the considerable evidence of non-waiver discussed *supra*, including the agreement not to interrogate Respondent; the instructions that Respondent should make no statement about the crime until he returned to Des Moines; the Respondent's own statements that he would provide information *after* he saw his attorney; and the fact that Respondent did not provide any information until after Detective Leaming's

interrogation efforts. Especially given this strong evidence against waiver. Petitioner cannot be said to have met any burden of showing waiver, heavy or otherwise.

III.

THE ACTIONS OF DETECTIVE LEAMING ALSO VIOLATED THE REQUIREMENTS OF *MIRANDA V. ARIZONA*.

The foregoing shows that Respondent's constitutional right to counsel was violated in this case quite apart from the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966). In addition, Detective Leaming's actions violated the requirements of *Miranda*.

There is no dispute that Respondent was given *Miranda* warnings in Davenport before the automobile trip to Des Moines began, and there is no issue here about the technical sufficiency of the warnings themselves. But *Miranda* does not permit law enforcement officials to interrogate an accused automatically after simply giving the required warnings. Rather, the *Miranda* decision provides that after warnings are given, interrogation may proceed only if the defendant waives his Fifth and Sixth Amendment rights; and an invocation of those rights by the defendant in any manner requires that interrogation cease at that time. In this case, Detective Leaming willfully violated the post-warning requirements of *Miranda* in two respects, either of which required suppression of the evidence obtained by Detective Leaming from Respondent.

A. Detective Leaming Persisted in Interrogating Respondent in the Absence of and without Notice to Respondent's Counsel Despite Statements by Respondent and by Others that he Should Not do so.

The first *Miranda* violation in this action is closely related to the Sixth Amendment violations described in the preceding section of this Brief. In *Miranda*, this Court held that even after proper warnings are given, if the accused indicates that he wishes to see an attorney before making any statements, interrogation must cease *until an attorney is present.*

> At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to the police, they must respect his decision to remain silent.
>
> . . . If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during this time.

384 U.S. at 474.

Detective Leaming's conduct in this case grossly violated the above-quoted guidelines. As discussed in more detail earlier in this Brief, Detective Leaming was informed several times, both by Respondent and by counsel, that Respondent wished to see Mr. McKnight before he provided any information about the crime; moreover, the police had agreed with Mr. McKnight that there would be no questioning of Respondent during the automobile trip. Nevertheless, Detective Leaming did not cease interrogation until Mr. McKnight was

present; instead, he made a concerted effort to obtain as much information as possible from Respondent, especially about the location of the body, before Respondent could consult with counsel. (App. 60, 61, 81).

Neither Petitioner nor the *amici* seriously suggest that Detective Leaming observed the requirements of *Miranda* in this case. Rather, Petitioner argues that the District Court and Court of Appeals "ignored clear facts that demonstrate an effective waiver of rights." (Brief for Petitioner, p. 48). There are at least two serious problems with this argument. First, waiver is not even an issue with regard to the *Miranda* violation described above: When the accused makes a request for counsel, *Miranda* creates a *per se* rule that interrogation must cease *until counsel is present*. Under this rule, the interrogating officer must make no further efforts to overcome the defendant's decision not to talk in the absence of counsel before counsel arrives–lest the request for counsel be nullified. *See, Michigan v. Mosley*, ____ U.S. ____, 96 S. Ct. 321, 329 (1975) (concurring opinion of Mr. Justice White); *see also, Brooks v. Perini*, 384 F.Supp. 1011 (N.D. Ohio 1973, *aff'd*, 497 F.2d 923 (6th Cir.) (table), *cert. denied*, 419 U.S. 998 (1974); *U.S. v. Blair*, 470 F.2d 331 (5th Cir. 1972), *cert. denied*, 411 U.S. 908 (1973); *U.S. v. Priest*, 409 F.2d 491 (5th Cir. 1969).

Of course, even when the defendant has not made any request for counsel after the giving of warnings,

> [i]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.

Miranda v. Arizona, supra, at 475. As argued more fully in Part II, above, Petitioner has failed to meet his burden of demonstrating a waiver by Respondent of either his right to remain silent *or* his right to counsel. In the end, Petitioner can show only that warnings were given and that incriminating statements were made–after Detective Leaming pursued his concerted effort to obtain as much incriminating information as possible from Respondent before he could consult with his attorney. But *Miranda* holds, consistently with *Johnson v. Zerbst*, 304 U.S. 458 (1938), that "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." 384 U.S. at 475.

B. Detective Leaming Refused to Cease Interrogation When Respondent Indicated that He Wished to Invoke His Right to Remain Silent Until He Reached his Attorney in Des Moines.

Detective Leaming's purposeful interrogation of Respondent also violated a second, related requirement of *Miranda*. In *Miranda*, this Court held that "when the accused indicates in any manner . . . that he wishes to remain silent, interrogation *must cease*." 384 U.S. at 473-74. The statements by Respondent and his counsel that are described above *and* Mr. McKnight's agreement with the police indicated in the clearest manner that Respondent wished to remain silent until he arrived in Des Moines and saw Mr. McKnight. Nevertheless, Detective Leaming admittedly continued to attempt to obtain incriminating information from Respondent *before* he

reached Mr. McKnight; in short, interrogation did *not* cease.

In *Michigan v. Mosley*, ____ U.S. ____, 96 S. Ct. 321 (1975), this Court held that *Miranda*'s requirement that interrogation cease following an indication of a desire to remain silent did not mean "that a person who has invoked his 'right to silence' can never again be subjected to custodial interrogation by any police office at any time or place on any subject." 96 S. Ct. at 325. Rather, this Court held that "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'" 96 S. Ct. at 326.

In determining that the defendant's "right to cut off questioning" was "scrupulously honored" in *Mosley*, this Court emphasized that after the defendant's initial statement that he did not wish to discuss the robberies for which he had been arrested, the interrogating officer immediately ceased questioning; that the second interrogation was conducted by another officer at a different place "after the passage of a significant amount of time"; that the defendant was given full *Miranda* warnings at the beginning of the second interrogation; and that the two sets of questioning involved different crimes. 95 S. Ct. at 326-27. None of these factors is present in the instant case: Detective Leaming interrogated Respondent in disregard of all statements that Respondent wished to remain silent during the automobile trip, including those made by Respondent during the trip; without giving fresh *Miranda* warnings; and about the very crime with regard to which Detective Leaming had been told that Respondent wished to remain silent. Moreover, unlike the defendant in *Mosley*, Respondent specified how long he wished to

remain silent, viz., until he saw his attorney in Des Moines. Given the distance between Davenport and Des Moines, this did not shut off questioning for an uncertain or unreasonable length of time; and Detective Leaming's attempts to obtain information specifically before they reached Mr. McKnight did not honor, scrupulously or otherwise, Respondent's exercise of his right to cut off questioning.[17]

C. Detective Leaming's Conduct Included "Interrogation," and his Violations of Miranda v. Arizona Were Not Merely Technical, But Were Willful and Concerted Efforts to Deprive Respondent of his Rights.

The *amici* in this case suggest that Detective Leaming did not "willfully" seek to violate Respondent's rights, and that his statements to Respondent did not constitute "questioning". (Brief *Amicus Curiae*, pp. 8, 10). Moreover, Petitioner suggests that Detective Leaming did not subject Respondent to "psychological interrogation." (Brief for Petitioner, p. 19). The record refutes all of these contentions.

In this case, Detective Leaming himself admitted that he was trying to obtain as much information as possible

[17] Detective Leaming also violated the *Miranda* guidelines by failing to repeat *Miranda* warnings after Respondent mentioned the victim's shoes and before Detective Leaming and Detective Nelson questioned Respondent about those shoes. (App. 72, 81-82, 99-100). Supp. App. to Pet., pp. A18-A19, 375 F.Supp. at 180. Even after an initial warning of rights is given, "[o]pportunity to exercise these rights must be afforded . . . throughout the interrogation." 384 U.S. at 478; *see also, U.S. v. Nielsen*, 392 F.2d 849 (7th Cir. 1968).

before Respondent had a chance to consult with Mr. McKnight, despite the many indications from Mr. McKnight, from Lieutenant Ackerman, from Mr. Kelly, and from Respondent that he should not do so, and despite the agreement with Mr. McKnight that Respondent would not be questioned. In short, this is not a case in which the police inadvertently failed to follow narrow, "technical" requirements of *Miranda*; Detective Leaming's efforts to obtain information from Respondent in the absence of counsel can only be regarded as a willful (and successful) attempt to deprive Respondent of his constitutional rights.

Moreover, whether Detective Leaming "asked questions" in a strictly semantical sense, his statements to Respondent, which admittedly were aimed at obtaining information from him, constituted interrogation for constitutional purposes. In particular, the "Christian burial" speech, although it contained no question marks, told Respondent that "we should stop and locate [the body] on the way in," and asked Respondent to "think about it as we're riding down the road." (App. 81). Moreover, the record shows that both Detective Leaming and Detective Nelson asked questions about the location of the victim's shoes at and around the "Grinnell exit." (App. 72, 81-82, 99-100). Quite apart from punctuation, the "Christian burial" speech was as much interrogation as the questions that were asked later about the victim's shoes. For Fifth and Sixth Amendment purposes, what is important is whether law enforcement officials attempt to obtain information from the defendant in the absence of counsel—and not whether their statements end with question marks.

IV.

MIRANDA V. ARIZONA SHOULD NOT BE OVERRULED IN THIS CASE.

Perhaps because they recognize that Detective Leaming's conduct in this case violated the most fundamental aspects of *Miranda v. Arizona*, 384 U.S. 436 (1966), both Petitioner and the *amici* call for the overruling (or reexamining) of that decision. But since the voluntariness issue that was litigated below but not raised in this Court disposes of this case, and since Detective Leaming's conduct violated the Sixth and Fourteenth Amendments quite apart from the requirements of *Miranda*, overruling *Miranda* would be futile and inappropriate in this case. Moreover, nothing in this case or in the history of the enforcement of *Miranda* indicates that that decision should be overruled; and such an action would be improper both constitutionally and pragmatically.

Petitioner and the *amici* point to four alleged aspects of this case as supporting the overruling of *Miranda*, or at least the modification of that decision so as not to apply herein: "a crime of the most heinous nature; the obvious guilt of the Defendant; difficulty, if not impossibility, of a successful retrial; and a complete lack of any sort of wilful or concerted misbehavior on the part of the police." (Brief of *Amicus Curiae*, p. 10; see also Brief for Petitioner, pp. 14-23). Each of these asserted justifications for "reexamining" *Miranda* is either factually incorrect or legally irrelevant—or both.

No one could question that the crime involved in this case was "most heinous." However, references to the "obvious guilt of the Defendant" are at best misleading. On this record, the evidence that Respondent removed

the victim's body from the Des Moines YMCA and placed it in a field outside Des Moines is undisputed. But Respondent, despite his eventual uncounseled disclosures to the police about the location of the victim's body, has never confessed to committing the murder. (App. 95). In this regard, Petitioner's assertion that "there has never been a hint of [sic] suggestion of any other suspect" (Brief for Petitioner, p. 28) is simply and categorically wrong: Both prosecution and defense testimony at trial established that one Albert Bowers, a maintenance man at the YMCA, also was seen in the area of the crime at the time it must have occurred, and defense counsel's examination of the witness clearly was designed to suggest the possibility that Mr. Bowers committed the murder. (See R. 49-51, 62, 190, 191-92, 193-96).[18] The police apparently did not seriously pursue the possibility of Mr. Bowers' guilt, and he left Des Moines shortly after the crime. (R. 62, 82, 137).[19]

But all of this concern with Respondent's guilt and the heinousness of the crime is, of course, irrelevant to

[18] "R." refers to the Abstract of Record which was filed in the Iowa Supreme Court in connection with Respondent's appeal to that Court, and which is part of the record in this Court. The portions of the Record referred to above were not included in the Single Appendix, and are not included as an Appendix to this Brief, because the points to which they are relevant are so peripheral to the real issues in this action.

[19] The police found hairs on the body of the victim, and took extensive hair samples from Respondent. Apparently, no hair samples were taken from Mr. Bowers. At trial, the prosecution introduced no evidence concerning the hair samples taken from Respondent; on cross-examination, one of the prosecution witnesses testified that he had sent the hair samples to the FBI, but that he did not know where they were at that time. (R. 100).

the constitutional issues in this case. The "logic" of Petitioner's argument would imply that the police may deprive those they believe are guilty of "heinous" crimes of the assistance of counsel and the right to remain silent. But these fundamental rights are not dependent on a finding that the accused is innocent; in order to be effective, they must be afforded every person accused of crime—and perhaps most especially to those accused of heinous crimes, with regard to which the temptation to bypass the rule of law may be the strongest. That evidence may establish the guilt of the Defendant does not justify the use of unconstitutional and unfair methods to obtain it.

The assertion that conviction on retrial would be "difficult, if not impossible" is both speculative and immaterial. There is of course no question that the evidence at issue here was highly significant to the State's case; but that is not to say that retrial would be impossible without it. The statements that are at issue in this case went only to whether Respondent knew where the body was; on that issue, the State still has other evidence that would not be affected by the decisions of the District Court and Court of Appeals. (See Brief for Petitioner, pp. 4-5.) Moreover, whether evidence relating to the body itself would be suppressed as derivative of Respondent's statements (see Brief *Amicus Curiae*, p. 6) is simply not at issue in this case; if the importance to the State's case is relevant to whether *that* evidence should be suppressed, then that is at best a consideration for the state courts on retrial.

But even if this case involved *all* of the evidence against Respondent, that would not be sufficient reason to approve the myriad, concerted violations of Respondent's Fifth and Sixth Amendment rights that

have been described *supra*. Moreover, if the "release of [Respondent] would present a very real danger to society," protection from the eventuality need not come from retrial and conviction. *See, e.g.*, Chapters 225A, 229 Code of Iowa (1973).

The most patently fallacious assertion by Petitioner and the *amici* is that there was a "lack of any sort of wilful or concerted misbehavior on the part of the police." (Brief *Amicus Curiae*, p. 10; see also Brief for Petitioner, pp. 19-21). As argued more fully in Part III(C) of this Brief, *supra*, Detective Leaming deliberately set out to pry as much information as possible out of Respondent before he could consult with his attorney, in violation of an agreement with Respondent's attorney and in the face of repeated indications that Respondent wished (a) to remain silent (b) until he saw his attorney. This was not a mere technical "slip-up" on Detective Leaming's part; his behavior can only be characterized as a willful disregard of Respondent's Fifth and Sixth Amendment rights.

The arguments by Petitioner and *amici* that the *Miranda* decision has had an adverse impact on the effectiveness of law enforcement (Brief *Amicus Curiae*, p. 10) and that it essentially precludes the use of confessions in criminal cases (Brief for Petitioner, p. 15) are unsupported and unsupportable. The statements of commentators quoted by Petitioner (Brief for Petitioner, pp. 21, 22, 25, 28-29), all were made within a year of the *Miranda* decision. At the time of the *Miranda* decision, as the dissenting opinions forcefully argued, 384 U.S. at 516-17 (opinion of Harlan, J.), 541-43 (opinion of White, J.), there was some reason to fear that inflexible application of the *Miranda* guidelines might impair law enforcement efforts by excluding from evidence virtually all confessions. However, the

subsequent implementation of *Miranda* has not excluded all confessions, and the *Miranda* procedures have not had a serious overall impact on the effectiveness of law enforcement.[20]

Soon after *Miranda* was decided, one of the *amici* in this case concluded that it did not appear that "the *Miranda* requirements will create any significant difficulties in the prosecution of future cases."[21] Experience has borne out that prediction. This may be due in part to the fact that interrogations and confessions are not essential tools in the great majority of criminal prosecutions.[22] In addition, scholarly research indicates that it is far from impossible for law enforcement officials to obtain valid confessions under *Miranda*;[23] and this is confirmed by the cases reaching this Court in which confessions are held admissible.[24]

[20] *See*, Seeburger and Wettick, *Miranda in Pittsburgh: A Statistical Study*, 29 U. Pitt. L. Rev. 1, 23, 26 (1967); Younger, *Effect of Miranda Decision on the Prosecution of Felony Cases*, 5 Amer. Crim. L. Q. 32, 34 (1966).

[21] Younger, *Some Views on Miranda v. Arizona*, 35 Fordham L. Rev. 255, 262 (1966).

[22] *See*, Project, *Interrogations in New Haven: The Impact of Miranda*, 76 Yale L.J. 1519, 1523, 1573-74, 1584-87, 1592 (n.196) (1967); Seeburger and Wettick, *supra* note 20, at 15, 26; Younger, *supra*, note 20, at 33.

[23] *See*, Medalie, Zeitz, and Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 Mich. L. Rev. 1347, 1351-52, (1968); Seeburger and Wettick, *supra*, note 20, at 12; Project, *supra* note 22, at 1523, 1613; Younger, *supra* note 20, at 34.

[24] *See, e.g., Michigan v. Mosley*, ____ U.S. ____, 96 S. Ct. 321 (1975); *Wilson v. Arkansas*, ____ U.S. ____, 96 S. Ct. 451 (1975); *Fred v. State*, 421 U.S. 966 (1975); *Dean v. Mississippi*, 420 U S. 974 (1975); *Michigan v. Tucker*, 417 U.S. 433 (1974); *Cannon v. South Carolina*, 414 U.S. 1067 (1974).

This is not to say that *Miranda* warnings have no impact on the interrogation process. It is fair to say that some additional percentage of those persons who are arrested for alleged criminal activity will exercise their Fifth and Sixth Amendment rights upon being informed of them.[25] But any constitutional right of the accused–particularly the Fifth and Sixth Amendments–will have some impact on the ability of the prosecution to obtain a conviction; that is of course the basis of our constitutional, adversary system of justice. And in any event the *Miranda* decision was not aimed at having any particular effect on the ability of the police to obtain confessions. Rather, it was designed to protect basic constitutional rights by assuring, to the extent pragmatically possible, that persons facing interrogation while in police custody would be able to know their rights and decide intelligently whether to exercise them. Requiring *Miranda* warnings and then permitting interrogation to follow only if there are reasonable indicia of a knowing and intelligent waiver of rights protects basic Fifth Amendment rights, but is not unduly burdensome and has not proved to seriously impair the ability of law enforcement officials to prosecute criminal cases.

Thus, quite apart from the existence of other independently dispositive issues in this case, overruling *Miranda* would serve no constitutional or pragmatic purpose. At the same time, to overrule or extensively modify *Miranda* would be destructive of the basic protections of the Fifth Amendment, would encourage

[25] *See*, Project, *supra* note 22, at 1523, 1576-78; Medalie, Zeitz, and Alexander, *supra* note 23, at 1372, 1414; Seeburger and Wettick, *supra* note 20, at 11.

the kind of police misconduct that occurred in this case, and would be a gratuitous infringement on the principle of *stare decisis*.

V.

THE DISTRICT COURT AND COURT OF APPEALS CORRECTLY APPLIED 28 U.S.C. §2254(d) IN RESOLVING THE FACTUAL ISSUES IN THIS CASE WITHOUT AN EVIDENTIARY HEARING, PURSUANT TO AN AGREEMENT BY THE PARTIES.

A. The District Court and Court of Appeals Carefully Observed 28 U.S.C. §2254(d)'s Presumption of Correctness for State Court Findings of Fact.

By agreement of the parties, the District Court relied entirely on the state trial court record in making its findings of fact and conclusions of law in this case. The District Court paid careful attention to the general presumption of correctness given to state court findings by 28 U.S.C. §2254(d), and none of its factual findings conflicted with those of the state trial court. Supp. App. to Pet., pp. A10, A22, 375 F.Supp. at 176, 181. The District Court did resolve factual issues that had not been resolved by the state trial court, primarily on the basis of the testimony of the police officers who were involved in the events in question, Supp. App. to Pet., pp. A2-A9, 375 F.Supp. at 172-75; this of course was proper under the explicit language of 28 U.S.C. §2254(d)(1). *See also, Townsend v. Sain*, 372 U.S. 293, 313-14 (1963). Moreover, the District Court resolved the constitutional issues differently from the state

courts. Again, this was clearly proper under 28 U.S.C. §2254(d), since that statutory provision gives a presumption of correctness only to state court *factual* findings. This Court has held that constitutional issues must be resolved independently by the federal courts: The state court "cannot have the last say when it . . . may have misconceived a federal constitutional right." *Brown v. Allen*, 344 U.S. 443, 508 (1952). *See also, Townsend v. Sain, supra*, at 318; *Doerflein v. Bennett*, 405 F.2d 171 (8th Cir. 1969).

Petitioner argues that the District Court's conclusion that Respondent "asserted his right or desire not to talk to the police in the absence of his attorney" (Brief for Petitioner, p. 58) violated 28 U.S.C. §2254(d) by conflicting with the state court findings. This argument is faulty on its merits—and even if meritorious, would not affect the validity of the District Court's and Court of Appeals' conclusions on the issue of "waiver".

On this record, there can be no dispute that on several occasions during the trip to Des Moines, Respondent told Detective Leaming that he would tell the whole story *when he saw Mr. McKnight in Des Moines*: Detective Leaming himself so testified, and there was no contrary testimony. As argued more fully in Part II, *supra*, especially in the context of the preceding events of that day, these statements by Respondent could only have been interpreted as an assertion of his desire to have Mr. McKnight present before he provided any information about the crime. In fact, they were so interpreted by Detective Leaming. (App. 58; see pp. 20-21, *supra*). Thus, even if one regarded the state trial court's reference to an "absence on [Respondent's] part of any assertion of his right or desire not to give information absent the presence of his attorney" as a finding of historical fact, it would

plainly be "not fairly supported by the record," 28 U.S.C. §2254(d)(8), and hence not entitled to a presumption of correctness under §2254(d). Supp. App. to Pet., p. A24, 375 F.Supp. at 182, n.5.

Moreover, the District Court's conclusion that Respondent had asserted his "desire not to provide information . . . absent his attorney" was a decision that Respondent's undisputed statements to Detective Leaming were legally sufficient to require that Detective Leaming not pursue interrogation further until they reached Mr. McKnight. In short, this conclusion involved the constitutional significance of the undisputed historical facts—and hence was not subject to §2254(d)'s general presumption of correctness.

> "Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts, . . . the District Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge."

Brown v. Allen, 344 U.S. 443, 507 (opinion of Frankfurter, J.) (1952). *See also, Neil v. Biggers*, 409 U.S. 188, 193, n.3 (1973); *Frazier v. Cupp*, 394 U.S. 731 (1969).

In any event, regardless of whether Respondent made any assertion at all in the police car on the way to Des Moines, the fact that Respondent did not wish to provide information about the crime until he saw his attorney had been communicated to the police, and they had agreed not to question Respondent during the trip. Moreover, as the District Court noted, whether Respondent asserted a desire to have counsel present for interrogation is not really crucial to the issue of

"waiver", since the absence of such an assertion would not demonstrate a waiver by Respondent of his Fifth and Sixth Amendment rights. Supp. App. to Pet., p. A24, 375 F.Supp. at 182.

B. The District Court Properly Based its Findings of Fact and Conclusions of Law on the State Court Record, Pursuant to an Agreement between the Parties.

Petitioner also argues that the District Court erred in not conducting an evidentiary hearing in order to resolve certain factual questions with regard to which there was some conflict in the record. This argument is remarkable in light of Petitioner's own conduct of this case. First, Petitioner specifically stipulated that the District Court *should* resolve the legal issues presented by Respondent's petition for a writ of habeas corpus strictly on the basis of the state court record, without any further evidentiary hearings. Second, when the District Court's memorandum and order granting the writ was issued, Petitioner failed to ask for reconsideration or for further evidentiary proceedings, despite the opportunity to do so. Third, Petitioner did not even complain about the lack of an evidentiary hearing at any time during his presentation of this case in the Court of Appeals. Petitioner's first mention of any claim that an evidentiary hearing should have been held was in his petition to this Court; thus, neither court below was even given an opportunity to pass on the claim.

Although this failure to timely raise it itself disposes of Petitioner's argument that an evidentiary hearing should be held, the argument in any event is invalid on its merits. *Townsend v. Sain*, 372 U.S. 293 (1963),

relied on by Petitioner, does not stand for the proposition that an evidentiary hearing always must be held by a district court considering a federal habeas corpus action regardless of the desires of the parties. Indeed, following the language quoted by petitioner, this court stated in *Townsend* that "either party may choose to rely solely upon the evidence contained in the state court record . . ." 372 U.S. at 322. Consistently with that language, in *Neil v. Biggers*, 409 U.S. 188 (1973), this Court made an independent determination that certain state line-up procedures had not been unreliable, on the basis of the state court record. And, as the language quoted by Petitioner itself indicates (Brief for Petitioner, p. 63), the court in *U.S. ex rel. McNair v. New Jersey*, 492 F.2d 1307 (3rd Cir. 1974), merely held that the government should be given an *opportunity* to present evidence in a habeas corpus proceeding; in this case, Petitioner explicitly chose to submit the case on the state court record, and did not ask for an opportunity to present evidence even when the District Court issued its memorandum and order.

A review of the state court record clearly supports the resolutions made by the District Court (and approved by the Court of Appeals) of the factual matters that were not resolved by the state trial court. For example, the conflict between Detective Leaming and Mr. Kelly (a) over whether Mr. Kelly told Detective Leaming that Respondent was to make statements about the crime only after reaching Mr. McKnight, and (b) over whether Mr. Kelly was denied permission to ride with Respondent to Des Moines were properly resolved by the District Court in Mr. Kelly's favor: On the one hand, Mr. Kelly was a duly licensed attorney with no personal stake in the outcome of the case; on the other, Detective Leaming did have a professional

stake in whether Respondent's efforts to suppress his disclosures about the location of the body succeeded, and the state trial court had expressed doubts about Detective Leaming's "candor". (App. 2) Especially when the parties have agreed to submit the case on the state court record, it is appropriate for a federal district court to consider the interests of the witnesses and the state court's findings with regard to credibility in resolving factual issues. *See*, Note, *Developments in the Law: Federal Habeas Corpus*, 84 HARV. L. REV. 1038, 1134-35 (1970); *Jackson v. U.S.*, 353 F.2d 862, 866 (D.C. Cir. 1965).

Moreover, contrary to Petitioner's assertion (Brief for Petitioner, p. 66), the District Court did not resolve the issue of the timing of Detective Leaming's "Christian burial" speech simply by saying that Petitioner had the burden of showing what the timing was although there is no dispute that Petitioner did have that burden. Rather, the District Court, after reviewing Detective Leaming's own testimony, concluded that that speech must have occurred some time after departure from Davenport—primarily because of the large number of other topics Detective Leaming discussed with Respondent before he made the speech. And the District Court concluded that the precise timing of Detective Leaming's "Christian burial" speech was not very important anyway, given the interrogation approach

Detective Leaming had used. Supp. App. to Pet., pp. A28-A29, 375 F.Supp. at 185.[26]

In short, the District Court correctly found the facts in this case on the basis of the state court record, giving careful deference to the factual findings of the state trial court under §2254(d). And in any event, even if every quarrel raised by Petitioner about the record were resolved in his favor and against the judgments made by the District Court and the Court of Appeals, the result in this case would not be different: Even if one assumes that Mr. Kelly did not exist at all, Detective Leaming violated an agreement with Mr. McKnight that Respondent should not be questioned, ignored indications that Respondent did not wish to speak until he saw Mr. McKnight, appealed to Respondent's known psychological weaknesses, and made statements to Respondent that called for incriminating information—all with the specific purpose of getting as much information as he

[26]Petitioner's complaints about the District Court's findings with regard to Detective Leaming's knowledge that Respondent was a religious person (Brief for Petitioner, p. 65) are answered by Petitioner's own discussion of the facts (Brief for Petitioner, pp. 12-13). In addition, the record clearly supports the District Court's conclusion that Detective Leaming did not tell Respondent the truth about his "knowledge" that the body was near Mitchellville (*cf.*, Brief for Petitioner, p. 66). Indeed, Detective Leaming conceded on cross-examination that he did not tell Repsondent the truth "one thousand percent" about his Mitchellville "theory", and that his non-truth was told in an effort to get Respondent to provide information before he reached Mr. McKnight. (App. 93-94). In any case, these points are not important to the legal issues raised in this Court, and were not emphasized by either the District Court or the Court of Appeals.

could from Respondent before Respondent reached his retained attorney. Any of these facts shows a violation of Respondent's Fifth and Sixth Amendment rights.[27]

CONCLUSION

Since Petitioner has not challenged the lower courts' decision that Respondent's statements were involuntary, and since that decision disposes of this case regardless of the issues that were raised in the petition for certiorari, this Court should affirm without reaching those issues. Moreover, even if the issues raised by the petition are reached, affirmance must follow, since under any view of the record, Detective Leaming purposefully deprived Respondent of the assistance of his previously retained counsel, in violation of the Sixth and Fourteenth Amendments, and violated the requirements of *Miranda v. Arizona, supra*.

Reversal of the judgments of the District Court and Court of Appeals would inform the police that so long

[27] Petitioner's invocation of the concepts of "comity" and "abstention" (Brief for Petitioner, pp. 69-73) is totally misplaced in this action. Those concepts are not applicable to federal habeas corpus actions in which the petitioner has exhausted available state remedies, and have not been applied by this Court to such actions. *See, e.g., Lefkowitz v. Newsome*, 420 U.S. 283 (1975); *Francisco v. Gathright*, 419 U.S. 59 (1974); *Robinson v. Neil*, 409 U.S. 505 (1973); *Townsend v. Sain*, 372 U.S. 293 (1963); *Brown v. Allen*, 344 U.S. 443 (1952). In any case, Petitioner did not raise this issue either in the lower courts or in his petition in this Court, and hence the issue is not properly before this Court. *See, Strunk v. Illinois*, 412 U.S. 434 (1973); *McCullough v. Kammerer Corp.*, 323 U.S. 327 (1945).

as they state *Miranda* warnings with technical correctness, they may then completely disregard the existence of defense counsel in criminal cases–and indeed may take affirmative steps to evade counsel's efforts to assist and protect the accused. Such a result would be destructive of basic Fifth and Sixth Amendment rights and would make it impossible for counsel to represent their clients in a sensible and effective manner in criminal cases.

For the reasons stated above, the judgment of the Court of Appeals should be *affirmed*.

Respectfully submitted,

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ADDENDUM A

[Excerpt from testimony at trial]

DON E. KNOX, JR.

Called as a witness on behalf of the plaintiff, testified as follows:

CROSS EXAMINATION

BY MR. MCKNIGHT:

* * *

Q: Now don't you recall me having called you that morning and you said Captain Leaming wasn't on duty?

A: Yes, sir.

* * *

Q: What time was it?

A: Approximately 8:05 A.M.

* * *

Q: Do you recall the conversation that you and I had about arranging to have the Defendant brought back to Des Moines?

A: Yes.

Q: Do you recall that I said I want him brought back to Des Moines and we'll have conferences here?

A: Yes.

Q: You remember that?

A: Yes.

[Mr. Knox was a Lieutenant of Detectives on the Des Moines Police Department].